No. 74-393

NOV 2 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

JERRY D. BRANTLEY, ET AL.,
PETITIONERS,

v.

UNION BANK & TRUST COMPANY, ET AL.,
RESPONDENTS,

GRANT BAKER, CLINTON GRADY,
ESSIE LEE FELTON, ET AL.,
PETITIONERS,

v.

R. FRANK KEEBLE, INDIVIDUALLY,
AND TOWN FINANCE CORPORATION
RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT UNION BANK AND TRUST COMPANY IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit in *Jerry D. Brantley, et al., vs. Union Bank and Trust Company,* No. 73-3625, and *Grant Baker, et al., vs. R. Frank Keeble,* No. 73-3631, is reported at 498 F.2d 365 (5th Cir. August 5, 1974). The opinion in *James et al., vs. Pinnix et al.,* No. 73-186, is reported at 495 F.2d 206 (5th Cir. June 10, 1974)

JURISDICTION

The petitioners seek to invoke this Court's jurisdiction under 28 U. S. C. §1254 (1). Respondent, Union Bank and Trust Company, respectfully submits that review on Writ of Certiorari is not a matter of right and upon close examination the petitioners have failed to meet the test set forth in Supreme Court Rule 19.

QUESTION PRESENTED

Does the enactment of Title 7A, Code of Alabama, §§ 9-503 and 9-504, which merely permits private, peaceful self-help repossession by a creditor from a defaulting purchaser, *significantly* involve the State of Alabama to amount to "state action" or action "under color of" state law to confer jurisdiction of the federal district court under 42 U. S. C. §1983, where the repossession took place after default on a private contract providing for peaceful repossession in case of default?

STATUTES INVOLVED

Revised Stat. Sec. 1979, 42 U. S. C. §1983, and Code of Alabama 1940 (Recomp. 1958) Title 7A §§ 9-503 and 9-504 are pertinent to the question presented and are adequately set forth in the Appendix to the petitioner's brief.

STATEMENT OF THE CASE

This litigation involves a suit by Jerry D. Brantley and Jean A Brantley (hereinafter referred to as the "Brantleys") against Union Bank & Trust Company, a corporation, and its employees (hereinafter collectively referred to for purposes of this litigation as the "Bank"), seeking to have Title 7A §§ 9-503

and 9-504 of the Code of Alabama declared unconstitutional because these sections *permit* limited peaceful self-help repossession without prior notice or hearing. The Brantleys allege a violation of the Fourteenth Amendment and claim jurisdiction in the federal district court by virtue of 42 U. S. C. 1983.

The facts, for purposes of this litigation, come entirely from Section V of the Brantleys' complaint. No testimony was taken. Briefly, the Brantleys allege that on April 11, 1972, they purchased from Mary Chevrolet Company in Troy, Alabama, a 1970 Pontiac automobile for $4,134.57. In order to finance the purchase, they signed a Retail Installment Contract (copy of which is attached to the complaint marked "Exhibit 2") promising to pay the aforesaid sum. The installment contract permitted the Bank to peacefully repossess the automobile in the event the Brantleys defaulted in payment for same.

Mary Chevrolet transferred this installment contract to the Bank and the Brantleys began paying the Bank on May 26, 1972, with monthly installments due on the 26th of each succeeding month for a total of 36 months. They made timely payments for May and June, but defaulted thereafter paying the July installment in August, the August installment in October, and the September installment in November. The automobile was repossessed by a private individual employed by the Bank, who acted without court process or aid of any state official. At the time of repossession the Brantleys were two months in default. The repossession was accomplished without force or breach of the peace. The Brantleys admit that they agreed, by contract, to surrender possession of the automobile in the event that they defaulted

(paragraph three of the Retail Installment Contract made an exhibit to the complaint).

The Bank filed a Motion to Dismiss[1] asserting as grounds therefor that the facts alleged by the Brantleys in their complaint affirmatively establish that they have not stated a claim against the Bank for which relief can be granted under 42 U. S. C. 1983, and its jurisdictional counterpart, 28 U. S. C. 1343, and that the complaint affirmatively demonstrates that the repossession was both private and peaceful and was not accomplished "under color of" state law.

The District Court decided the case on the pleadings and written briefs without any testimony, and dismissed the action for lack of federal jurisdiction, finding no "state action" within the meaning of §1983. An appeal was taken from the order of dismissal.

The *Brantley* and *Baker* cases were consolidated for purposes of appeal by the Court of Appeals for the Fifth Circuit. Briefs were filed and the Court postponed disposition of the appeal pending its decision in *James vs. Pinnix,* 495 F.2d 206 (1974). On August 5, 1974, the Court affirmed the judgment of the District Court dismissing the complaints in *Brantley* and *Baker,* holding that requisite state action was lacking.

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[1]The Motion to Dismiss is appended he

ARGUMENT

I.

THE DECISION BELOW IS CLEARLY CORRECT

Title 42 U. S. C. §1983 expressly requires state action not only for the purpose of jurisdiction but also to state a claim for redress under the Fourteenth Amendment to the Constitution. The due process clause of the Fourteenth Amendment provides:

> ". . . [N] or shall any state deprive any person of life, liberty, or property, without due process of law."

The plain wording of §1983 and the due process clause make it clear that only *state* deprivation is prohibited: *Shelley vs Kraemer*, 334 U. S. 1 (1948). Therefore, state action is both jurisdictional under 1983 as well as essential to the due process violation. Moreover, the state must be significantly involved in the repossession *Moose Lodge No. 107 vs. Irvis*, 407 U. S. 163 (1972). Clearly if the state is not *significantly involved* for 1983 jurisdiction, there can be no due process violation.

The United States Supreme Court has made it abundantly clear that the mere existence of a state statute will not constitute state action unless the state statute significantly involves the state in the private action by creating the right to act or compelling or requiring the action.

In the case of *Moose Lodge No. 107 vs. Irvis*, 407 U. S. 163 (1972), decided subsequent to *Reitman vs. Mulkey*, 387 U. S. 369 (1967), the Court held that state action could not be based upon the per-

vasive state regulatory scheme which did not *significantly* implicate the state in the discriminatory practices and policies of the private party. In that case the plaintiff, who had been denied service of an alcoholic beverage while at the Lodge, argued that there was state action since the Lodge derived its authority to sell liquor solely from a license from the state and the state extensively regulated the activities of the Lodge.

The Court rejected this argument holding that where private conduct is challenged, state action will not be found unless the state has "significantly involved itself" with the challenged conduct, 407 U. S. at 177. The Court found no such state involvement, stating:

> "We therefore hold that, with the exception hereafter noted, the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge so as to make the latter 'State action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment."

In the instant litigation the creditors acted pursuant to private agreements with the debtors. Conditional sales agreements similar to ones used by the Bank were in existence long before Alabama enacted §§ 9-503 and 9-504. These sections do not create or change remedies traditionally available to secured creditors nor do they compel or require self-help repossession.

II

THERE IS NO CONFLICT OF DECISION AND THE QUESTION OF LAW IS SETTLED

Research has revealed that all federal appellant courts to meet the issue raised by the question presented have failed to find significant state action present.

Gibbs vs. Titelman, Nos. 74-1062 to 74-1067 (3rd Cir., filed August 1, 1974);
Nowlin vs. Professional Auto Sales, Inc., No. 73-1348 (8th Cir., filed April 25, 1974):
Shirley vs. State National Bank of Connecticut, No. 73-1783 (2d Cir., filed February 14, 1974):
Adams vs. Southern California First National Bank, 492 F.2d 324 (9th Circuit, 1973);
Bichel Optical Laboratories, Inc., vs. Marquette National Bank, 487 F.2d 902 (8th Cir., 1973);
Turner vs. Impala Motors. No. 73-1826 (6th Cir., Sept. 20, 1974).

There is, therefore, no conflict in the decisions for this Court to decide.

The various Circuits deciding the question presented are also uniform in distinguishing *Reitman vs. Mulkey*, on the basis that *Reitman* involves racial discrimination. Despite this distinction, it is clear that in each and every case the court found that the particular state was not *significantly* involved in self-help repossession merely by the enactment of §§ 9-503 and 9-504.

In the *Turner vs. Impala Motors*, No. 73-1826 (6th Circuit, Sept. 20, 1974), ...F.2d ....., it was stated:

"We are likewise persuaded that *Reitman* cannot be relied upon to justify a finding of state action here. Our opinion in *Palmer* notwithstanding, 479 F.2d 153 (6th Cir. 1973), we view *Reitman* as dealing with a state attempt to accomplish indirectly what it was prohibited from doing directly. We cannot ignore the fact that the context of onerous racial discrimination in which the case was set demanded special scrutiny. The injustices of racial discrimination cast a different shadow than that of the case now before us. See *Oller vs. Bank of America*, 342 F. Supp. 21, 23 (N. D. Cal. 1972)

* * *

"Appellant makes the principal point that the private activity before us should be viewed as encouraged by the statute and therefore a finding of state action is justified, While acknowledging that the point has a measure of merit, we do not find it persuasive.

"It is clear that in this case the state did not exert any control or compulsion over the creditor's decision to repossess. The private activity was not commanded by the simply permissive statute. While mere existence of the statute might seem to suggest encouragement, we conclude that the effect of the statute is only to reduce a creditor's risk in making repossessions. As a practical matter, a creditor's decision is more likely to be principally influenced by the economics of the situation than by the presence of a permissive statute.

"We fail to see where the creditor has sought to invoke any state machinery to its aid. Rather, the creditor has simply relied upon the terms of his

security agreement pursuant to the private right of contract. Compare *Shelley vs. Kraemer,* 334 U. S. 1 (1948). Assuming that the statute was nonexistent, the remedy of self-help repossession could still be utilized based on its common law heritage and the private right to contract. We fail to see how the creditor is attempting to enforce any right in reliance upon a constitutional or statutory provision as in *Reitman* or is even asserting any state-created right. Rather, we see a creditor privately effectuating a right which was created in advance by contract between the parties. At best the right is one that is merely codified, but not created, in the statute.

"Appellant also argues that the statute authorizes an individual to perform the governmental function of seizing private property. As stated previously, the statute merely codified and did not create any right or state power. Were we to rely upon the mere fact of codification, we would in part be making available to a complex matrix of human behavior, as regulated by statutes, the scope of federal remedies. We decline to establish that precedent, particularly under the circumstance of a statute that is permissive in nature."

The Fifth Circuit in *Brantley, Baker* and *Pinnix* likewise distinguished *Reitman vs. Mulkey,* and *Moose Lodge No. 107 vs. Irvis,* and stated that "some state involvement in the *Reitman-Moose Lodge* sense may be present here, but it is simply not enough . . ." The Fifth Circuit therefore found that there was no significant state involvement; stating that racial discrimination cases set the outer boundaries of "imputed" state action and that they were "unwilling to push

out the frontiers still farther". By these references the Court was not establishing a "double standard" as alleged by the petitioners. The Court merely noted that the United States Supreme Court has established what appears to be the outer limits of state action in decisions in racial discrimination cases.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

*

JERRY D. BRANTLEY AND
JEAN A. BRANTLEY, *
Plaintiffs
CIVIL ACTION
Vs. * NO. 4007-N

UNION BANK & TRUST COMPANY,
A CORPORATION; DOUG GOODWIN *
INDIVIDUALLY; AND LANGFORD
INVESTIGATORS, INC., A *
CORPORATION
Defendants *

MOTION TO DISMISS

Comes the defendant, Union Bank & Trust Company, a Corporation, and moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss the action on the grounds that the Court lacks jurisdiction because the facts alleged in the complaint affirmatively show that the alleged acts of the defendants were not "under color of" state law within the meaning and requirements of

42 U. S. C., Section 1983, and its jurisdictional counterpart, 28 U. S. C., Section 1343.

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